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No. 98-818

In the

Supreme Court of the United States

October Term, 1998

HAROLD F. RICE,
Petitioner,

v.

BENJAMIN J. CAYETANO,
Governor of the State of Hawaii,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of Petitioner, Harold F. Rice. Written consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the Clerk of this Court.[1]

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF has participated in numerous cases involving issues arising under the Fifth and Fourteenth Amendments to the United States Constitution. Amicus believes the lower court's opinion poses a serious threat to the heretofore absolute right to vote without regard to race.

The lower court's opinion additionally sets aside this Court's long-held doctrine that legislative schemes granting benefits and rights based upon race are inherently suspect and will be upheld only upon the most searching scrutiny. The lower court's opinion would legitimize government conduct granting special rights to a racial group, so long as government claimed that such treatment was based upon a "special" or "political" relationship with the benefited group. The lower court's opinion is in serious conflict with the decisions of this Court, and must be overturned.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 146 F.3d 1075 (9th Cir. 1998). The

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[1] Pursuant to Supreme Court Rule 37.6, PLF represents that no counsel for a party authored this brief in whole or in part, and that no monetary contribution to the preparation or submission of this brief was made by any person or entity.

opinion of the district court is reported at 963 F. Supp. 1547 (D. Haw. 1997).

STATEMENT OF THE CASE

This case presents two issues: (1) whether the wording of the Fifteenth Amendment means what it says and absolutely prohibits restriction of the franchise in all elections, notwithstanding the asserted justification for the discrimination; and (2) whether a state can insulate its actions from strict scrutiny review by declaring that its relationship with a benefited racial group is based on a "political" or "special trust" relationship alleged to be similar to that which exists between the United States and federally recognized Indian Tribes.

The case arises out of Petitioner's attempt to register to vote in an election for the trustees of the Office of Hawaiian Affairs (OHA). His registration was denied on the grounds that he was not a "Hawaiian" or "native Hawaiian."[2] The denial was based on Article XII, Section 5, of the Hawaii Constitution, which provides that "[t]here shall be a board of trustees for the Office of Hawaiian Affairs elected by qualified voters who are

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[2] As used in this brief and as defined by the relevant statutes, "Hawaiian" means "any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii," and "native Hawaiian" means

> any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778, as defined by the Hawaii Homes Commission Act, 1920, as amended; provided that the term identically refers to the descendants of such blood quantum aboriginal peoples which exercised sovereignty and subsisted in the Hawaiian Islands in 1778 and which peoples thereafter continued to reside in Hawaii.

Haw. Rev. Stat. § 10-2.

Hawaiians, as provided by law," and Hawaii Revised Statute § 13D-3(b), which implements it by providing that

> [n]o person shall be eligible to register as a voter for the election of board members unless that person meets the following qualification: (1) The person is Hawaiian.

Petitioner filed suit in the United States District Court for the District of Hawaii, alleging that he had been denied his right to vote on the basis of race, in violation of the Fourteenth and Fifteenth Amendments to the United States Constitution.

On May 6, 1997, summary judgment was entered against Petitioner on his claims. The district court's opinion was affirmed by the Ninth Circuit Court of Appeals. The court of appeals agreed that "there is a racial classification on the face of § 13D-3, and that it is suspect as such." *Rice v. Cayetano*, 146 F.3d at 1082. Nevertheless, relying on *Salyer Land Co. v. Tulare Lake Basin Water Storage District*, 410 U.S. 719 (1973), it upheld the classification as a rational restriction limiting eligible voters in a "special purpose" election to those most affected. The Court also concluded that the franchise was constitutionally permissible because it restricted voting to an essentially "political" class, relying on the rationale of *Morton v. Mancari*, 417 U.S. 535 (1974), and assuming that the State of Hawaii had a "trust relationship" with Hawaiians and native Hawaiians similar to that which exists between the United States and Indian tribes. *Rice v. Cayetano*, 146 F.3d at 1081.

In order to understand more clearly the issues in this appeal, one must first consider the history which led up to the creation of OHA. In 1810, King Kamehameha I unified the Hawaiian Islands into a monarchical government under his control. He, and later two of his sons who followed him on the throne as Kamehameha II and Kamehameha III, had absolute ownership of all land in the Kingdom, subject to a feudal tenure by various chiefs who owed allegiance to the King and held their land at his

pleasure. *Kalipi v. Hawaiian Trust Co.*, 66 Haw. 1, 656 P.2d 745 (1982).

In the late 1840s, King Kamehameha III transformed the traditional feudal landholding system into a system of fee ownership based on western law. As a result of this "*mahele*," or division, the King controlled 24% of the land as his personal property (these lands were later referred to as "Crown Lands"). Thirty-six percent of the land was conveyed to the Hawaiian Government, and 39% was conveyed to various chiefs. Although the common people were allowed to claim the land on which they lived and cultivated, the amount of land actually granted to the common people amounted to less than 1% of the total. Neil M. Levy, *Native Hawaiian Land Rights*, 63 Cal. L. Rev. 848, 854-58 (1975).

By the time of the overthrow of the Kingdom of Hawaii in 1893, Hawaiians and native Hawaiians comprised a minority of the inhabitants of the Islands. A majority of the inhabitants were nonnative Hawaiians; many of them were born in Hawaii, and many were citizens of the Kingdom. *See* Hawaiian Almanac and Annual for 1893, at 11, 14 (1892); Russ Apple & Peg Apple, Land, Lili`uokalani, and Annexation, 127-30 (1968). The Kingdom was replaced by a provisional government (succeeded by the Republic of Hawaii), which sought annexation of the Islands by the United States.

Hawaii was annexed by the United States in 1898. As part of annexation, the Republic of Hawaii ceded the government and former Crown lands to the United States. The Newlands Resolution, Act of July 7, 1898, 30 Stat. 750, which implemented annexation, provided that the revenues from the ceded lands "shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes."

In 1920, Congress enacted the Hawaiian Homes Commission Act, Pub. L. No. 67-34, 42 Stat. 108 (1921) (HHCA). The HHCA set aside approximately 200,000 acres of

ceded lands as "available lands" which would be leased for homestead purposes to "native Hawaiians," defined as "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." HHCA § 201(7).

Hawaii became a state in 1959. As a condition of admission, Hawaii agreed to adopt the HHCA as part of the Hawaii Constitution. Hawaii Admission Act, Pub. L. No. 86-3, 73 Stat. 4 (1959), at § 4. Most of the ceded lands were reconveyed to the State of Hawaii pursuant to Section 5(b) of the Hawaii Admission Act. Section 5(f) of the Act provided that the ceded lands, together with the proceeds and income therefrom, were to be held by the state as a public trust for five purposes: (1) the support of the public schools and other public educational institutions; (2) for the betterment of the conditions of native Hawaiians, as defined in the HHCA; (3) for the development of farm and home ownership on as widespread a basis as possible; (4) for the making of public improvements; and (5) for the provision of lands for public use. Section 5(f) gives the State of Hawaii discretion to use the ceded lands for any "one or more of the foregoing purposes."

Until the creation of OHA, the only ceded lands used "for the betterment of conditions of native Hawaiians" were the "available lands" set aside under the HHCA.

The State of Hawaii devoted most of the ceded land income and proceeds to funding the programs of the Hawaii State Department of Education. *See* 80-8 Haw. Att'y Gen. Op., 1980 WL 26216 (July 8, 1980).

OHA was created as a state agency pursuant to a proposal of the 1978 Hawaii Constitutional Convention which was ratified as Article XII, Section 5, of the State Constitution. Article XII, Section 5, provided that OHA

> shall hold title to all the real and personal property now or hereafter set aside or conveyed to it which shall be

> held in trust for native Hawaiians and Hawaiians. There shall be a board of trustees for the Office of Hawaiian Affairs elected by qualified voters who are Hawaiians, as provided by law. The board members shall be Hawaiians.

Article XII, Section 5, and related amendments to the Hawaii Constitution enacted as a result of the 1978 Constitutional Convention fundamentally changed treatment of the ceded lands under State law. Although, previously, only that portion of the ceded lands set aside for the HHCA was utilized for the betterment of native Hawaiians, Article XII, Section 4, now provided that all of the ceded lands, excluding only the HHCA "available lands," "shall be held by the State as a public trust for native Hawaiians and the general public." Article XII, Section 6, provided that OHA would receive income and proceeds from a "pro rata" portion of the ceded lands, later defined by statute as "twenty percent of all revenue derived from the public land trust." Haw. Rev. Stat. § 10-13.5. The effect of the constitutional amendments was to give native Hawaiians, through the vehicle of OHA, a state-created undivided trust right in *all* of the ceded lands, *plus* exclusive rights in that portion of the ceded lands set aside for purposes of the HHCA. *Cf.*, Conference Committee Report No. 77, 1979 Haw. Sen. J. at 998 (describing reinterpretation of Section 5(f) by 1978 Constitutional Convention to create trust rights in favor of na'ive Hawaiians in all ceded lands).

The election by which the 1978 proposed amendments were ratified was challenged in Hawaii's courts, on the ground, *inter alia*, that the voters had not been adequately informed on the proposed amendments. The Hawaii Supreme Court agreed, and voided the ratification of a number of the amendments, including the amendment which defined the terms "Hawaiian" and "native Hawaiian" as used with regard to OHA in Article XII of the Hawaii Constitution. *Kahalekai v. Doi*, 60 Haw. 325, 342, 590 P.2d 543, 555 (1979); *see also* revisor's Note, Haw. Rev.

Stat. Vol. I at 163. Hawaii's highest court concluded that the electorate had never validly ratified the racial restrictions relating to OHA, the Legislature nevertheless enacted Haw. Rev. Stat. chs. 10 and 13, which statutorily created the racial classifications and exclusions at issue here.

In addition to managing numerous programs which expend public funds for Hawaiians and native Hawaiians, *see* programs listed in OHA's web-page at "http://www.oha.org" and "http://planet-hawaii.com/oha," OHA also secures private benefits for its beneficiaries. Among other things, upon satisfactory completion of an application form showing that the applicant possesses Hawaiian blood, OHA issues the applicant an "Operation 'Ohana" card which evidences the beneficiary's Hawaiian race and entitles the holder to monetary discounts from participating private vendors of goods and services, including providers of public accommodations. *See, e.g., Ka Nuleka 'Ohana*, May, 1995, reporting that "[m]ore and more businesses are offering discounts at the flash of your Operation 'Ohana card," and listing new participating merchants including Hawaiian Vacation Retreats, a "luxury bed and breakfast vacation rental."

SUMMARY OF ARGUMENT

The Fifteenth Amendment to the United States Constitution provides that the right of United States citizens to vote shall not be abridged on the basis of race, color, or previous condition of servitude. The express wording of the Amendment leaves no room for conditioning the right to vote on the basis of race, no matter what rationale may be put forward to justify such a restriction.

This Court's opinion in *Salyer Land* does not apply in the instant action. The issue in *Salyer* was whether an election process restricting voting in a water district based on land ownership violated the "one-man, one-vote" principle enunciated in *Reynolds v. Sims*, 377 U.S. 533 (1964). Nothing in *Salyer*

Land indicates that the express provisions of the Fifteenth Amendment can be abrogated by declaring that an election conditioned on race is a "special purpose" election.

Nor does the racial restriction meet constitutional muster under the Fourteenth Amendment. Hawaiians and native Hawaiians are not "Indian Tribes" within the meaning of the Constitution, but are groups defined purely by reference to race. The rational basis review which this Court held applies to federal legislation affecting Indian Tribes must be strictly confined to those political entities which have received formal recognition as an Indian Tribe by the United States.

Affirmance of the Ninth Circuit's rationale for upholding a racially restricted election would have an extremely pernicious effect. Allowing a state to circumvent strict scrutiny review of legislation preferring a racial group by the simple expedient of declaring the group is a state equivalent of an Indian Tribe would create great mischief, and over time lead to wholesale racial balkanization.

ARGUMENT

I

THE FIFTEENTH AMENDMENT PROHIBITS ANY AND ALL RESTRICTIONS ON THE RIGHT TO VOTE BASED ON RACE, INCLUDING THE EXPRESS RACIAL LIMITATION ESTABLISHED BY THE OHA FRANCHISE

A. The Fifteenth Amendment Prohibits States from Denying or Abridging the Right to Vote Based on Race

The Fifteenth Amendment to the United States Constitution provides, in pertinent part:

> The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color or previous condition of servitude.

The right to vote has been declared fundamental by this Court, a right which is guaranteed to all citizens by the Fifteenth Amendment:

> "The right to vote freely for the candidate of one's choice is of the essence of a democratic society. . . ." *Reynolds v. Sims*, 377 U.S. at 555. For much of our Nation's history, that right sadly has been denied to many because of race. The Fifteenth Amendment, ratified in 1870 after a bloody Civil War, promised unequivocally that "[t]he right of citizens of the United States to vote" no longer would be "denied or abridged . . . by any State on account of race, color, or previous condition or servitude."

Shaw v. Reno, 509 U.S. 630, 639 (1993).

The Fifteenth Amendment is self-executing. *South Carolina v. Katzenbach*, 382 U.S. 967 (1966). It is absolute on its face, and permits no justification of denial or abridgment of the franchise on racial grounds. It "squarely prohibits racially-based denials of the right to vote," Laurence H. Tribe, *American Constitutional Law*, at 335 n.2 (2d ed. 1988), and renders inoperative any provision of a state constitution that restricts the right to suffrage to members of a particular race. *Neal v. Delaware*, 103 U.S. 370, 389 (1881).

In order to evade its express prohibition of racial qualifications for voting, a number of states that "refused to take no for an answer" tried to circumvent the amendment by implementing various tests and devices to limit the franchise. Blumstein, *Defining and Proving Race Discrimination: Perspectives on the Purpose v. Results Approach from the Voting Rights Act*, 69 Va. L. Rev. 633, 637 (1983). These included ostensibly race-neutral devices such as literacy tests with "grandfather clauses" and "good character" provisos, as well as racial gerrymanders. *Shaw*, 509 U.S. at 639-40.

Gomillion v. Lightfoot, 364 U.S. 339 (1960), illustrates the scope of the Fifteenth Amendment's prohibition of racially restrictive voting. At issue was an alleged attempt by the State of Alabama to define the boundaries of the City of Tuskegee so as to exclude Negro voters:

> The essential inevitable effect of this redefinition of Tuskegee's boundaries is to remove from the city all save four or five of its 400 Negro voters while not removing a single white voter or resident. The result of the Act is to deprive the Negro petitioners discriminatorily of the benefits of residence in Tuskegee, including, *inter alia*, the right to vote in municipal elections.

364 U.S. at 341. The Court stated that, if plaintiffs' allegations were proven at trial,

> the conclusion would be irresistible, tantamount for all practical purposes to a mathematical demonstration, that the legislation is solely concerned with segregating white and colored voters by fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote.

Id. Even though the racial redefinition was not expressly racial, the Court took notice of its actual effect and stated that "'[t]he [Fifteenth] Amendment nullifies sophisticated as well as simple-minded modes of discrimination.'" 364 U.S. at 342 (quoting from *Lane v. Wilson*, 307 U.S. 268, 275 (1939)).

In contrast, the racial nature of the OHA franchise is apparent on the face of the statute. Unlike the more sophisticated tests and devices once utilized by other states, the racial restriction here is facial and blatant. Amicus contends that such a racial restriction contradicts the clear meaning of the Fifteenth Amendment and is, therefore, impermissible and void.

B. The OHA Elections Are Elections of "Public Officials" to Which the Requirements of the Fifteenth Amendment Apply

The Fifteenth Amendment applies to all elections of public officials: "Clearly, the [Fifteenth] Amendment includes *any election* in which public issues are decided or public officials selected." *Terry v. Adams*, 345 U.S. 461, 468 (1953) (emphasis added). The Court confirmed this in *Chisom v. Roemer*, 501 U.S. 380 (1991), which concerned Section 2 of the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965). The version of Section 2 before the Court mandated that

> [n]o voting qualification or prerequisite to voting . . . shall be imposed or applied by any State or political subdivision to deny or abridge the right . . . to vote on account of race or color.

The Court held that Section 2 did not make any distinctions or impose any limitation "as to which elections would fall within its purview," 501 U.S. at 392, and was "unquestionably coextensive with the coverage provided by the Fifteenth Amendment." *Id.*

There can be no dispute that the OHA Trustees are public officials. For example, they receive a salary which is paid out of revenues from the State's ceded lands, and are "included in any benefit program generally applicable to officers and employees of the State except for benefit programs relating to retirements." Haw. Rev. Stat. § 10-9. The trustees have also previously taken the position in the federal courts that they are officers of the State. *See Price v. Akaka*, 928 F.2d 824, 828 (9th Cir. 1990) (claim of Eleventh Amendment immunity); *Price v. Akaka*, 3 F.3d 1220, 1221 (9th Cir. 1993) (upholding trustees' claim of qualified immunity as public officials).

The State has defended its racial limitation on the ground that the OHA elections are "special purpose" elections such as

the limited franchise elections upheld by this Court in *Salyer Land Co. v. Tulare Water District*, 397 U.S. 719, and *Ball v. James*, 451 U.S. 355 (1981). This ignores the fact that the proposed constitutional provisions restricting OHA racially were not validly ratified by the electorate, nor would they be constitutional if they were. Further, nothing in those cases can be read for the proposition that restricting the franchise to a single race would be a valid "special purpose" election which would avoid the requirements of the Fifteenth Amendment. Indeed, neither the Fifteenth Amendment nor a limited racial franchise were at issue in those cases. Instead, the Court considered whether a nonracial limitation would violate the "one man, one vote" requirement of the Fourteenth Amendment enunciated by the Court in *Reynolds v. Sims*, 377 U.S. 533. The Court indicated that

> there might be some case[s] in which a State elects certain functionaries whose duties are so far removed from normal governmental activities and so disproportionately affect different groups that a popular election in compliance with *Reynolds* . . . might not be required.

Ball v. James, 451 U.S. at 363.

Thus, in *Ball* the Court upheld the constitutionality of an Arizona election process which limited voting for directors of an agricultural and power district to landowners, and apportioned voting power according to the area of land owned by each landowners. This Court held that the district's purpose was sufficiently narrow and specialized and its activities affected the landowners so disproportionately as to exempt it from the one-man, one-vote rule. *Id.* at 370-71.

Similarly, in *Salyer Land* the Court upheld a California election system which restricted voting for directors of a water district based on land ownership. In so doing, the Court pointed

to the facts that the water district had relatively limited government authority, the district's primary purpose was to provide for the acquisition, storage, and distribution of water for farming in the Tulare Lake Basin, and the district's actions disproportionately affected landowners. 410 U.S. at 728-30.

Again, however, there was absolutely no intimation by the Court in those cases that a state could similarly limit the franchise on the basis of race by claiming that the elections disproportionately concern members of a specific race. Moreover, an examination of OHA quickly reveals that it is not the type of limited-purpose organization described in *Ball* and *Salyer*.

Most importantly, OHA is given a 20% share of the revenues from the ceded lands trust. The Hawaii Constitution provides that the beneficiaries of the ceded lands are both native Hawaiians and the general public:

> The lands granted to the State of Hawaii by Section 5(b) of the Admission Act and pursuant to Article XVI, Section 7, of the State Constitution, excluding therefrom lands defined as "available lands" by Section 203 of the Hawaiian Homes Commission Act, 1920, as amended, shall be held by the State as a public trust for native Hawaiians *and the general public*.

Haw. Const., art. XII, § 4 (emphasis added). In addition, OHA receives legislative appropriations from general tax revenues. *See* Respondent's Brief in Opposition to Petition for Certiorari at 28-29. As a result, OHA recently reported to its beneficiaries that as of February 28, 1999, it held cash and investment assets of $336,718,196. OHA Financial Report, *Ka Wai Ola o Oha*, Apr. 1999.

OHA has an immense impact on Hawaii taxpayers and the economy by its claim to 20% of the public revenues from the ceded lands. This has led to protracted litigation in state courts between OHA and the State over additional amounts, which OHA argues the State has failed to pay. The dispute is presently pending decision in the Hawaii Supreme Court, which has delayed issuing a ruling to allow the parties time to reach a potential settlement.

On April 27, 1999, the *Honolulu Advertiser* reported that, in response to a prior State offer to settle the claims for $251 million, OHA negotiators had extended a counteroffer in the amount of $304 million, plus 200,000 acres of land from the ceded lands trust. The monetary payment includes $56.6 million dollars from rent paid to the State by lessee DFS Waikiki; $31.8 million for revenues from land under Hilo Hospital's patient and cafeteria services; $12.9 million from rent from land used for low- and moderate-income housing projects by the Hawaii Housing Authority and Housing Finance and Development Corporation, and $123.3 million in interest on money allegedly owed to OHA from these projects. Yasmin Anwar, *Ceded Land Proposal Strongly Criticized,* Honolulu Advertiser, Apr. 27, 1999, at A-1, A-8. The next day, however, OHA's offer was withdrawn by OHA's Board of Trustees as inadequate, and OHA broke off negotiations. Yasmin Anwar, *OHA Cuts Off Talks with State Over Ceded Lands*, Honolulu Advertiser, Apr. 28, 1999, at A-1, A-8. Depending upon how the amounts are calculated, potential liability for the State and its taxpayers is estimated as between $450 million and $1.2 billion. *Id.*

These factors alone fundamentally distinguish OHA from the limited purpose entity in *Salyer,* where the Court emphasized "[a]ll of the costs of district projects [were] assessed against land by assessors in proportion to the benefits received" and that because general tax dollars were not used, "there is no way that

the economic burdens of district operations can fall on residents *qua* residents." 410 U.S. at 729. Further, OHA possesses broad governmental powers far beyond the limited purpose entities in *Ball* and *Salyer*. *See generally* Haw. Rev. Stat. §§ 10-3 through 10-6. The broad scope of its asserted authority is revealed by Hawaii Revised Statute § 10-3, which provides in pertinent part that the purposes of OHA include:

> (1) The betterment of conditions of native Hawaiians;
>
> (2) The betterment of conditions of Hawaiians;
>
> (3) Serving as the principal public agency in this State responsible for the performance, development, and coordination of programs and activities relating to native Hawaiians and Hawaiians . . . ;
>
> (4) Assessing the policies and practices of other agencies impacting on native Hawaiians and Hawaiians, and conducting advocacy efforts for native Hawaiians and Hawaiians;
>
> (5) Applying for, receiving, and disbursing, grants and donations from all sources for native Hawaiian and Hawaiian programs and services; and
>
> (6) Serving as a receptacle for reparations.

Haw. Rev. Stat. § 10-3. The only sense in which the purpose of OHA is "limited" is that all its activities are directed at a single race. Again, however, neither *Salyer* nor *Ball* give any authority for the proposition that race is an acceptable criterion which would permit limitation of the franchise in a state election despite the express wording of the Fifteenth Amendment.

II

THE OHA FRANCHISE ALSO VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

A. Absent a Compelling State Interest, Any Attempt to Discriminate on the Basis of Race in Voting Also Violates the Fourteenth Amendment

The limitation of the OHA franchise to Hawaiians and native Hawaiians also violates the Fourteenth Amendment, which provides that "[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." *Shaw v. Reno*, *supra*, held that statutes which have the effect of discriminating on the basis of race with respect to the right to vote presumptively violate the Fourteenth Amendment as well as the Fifteenth Amendment. This is especially so where, like the OHA franchise, the racial restriction is apparent on the face of the statute:

> No inquiry into legislative purpose is necessary when the racial classification appears on the face of the statute. See *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979). Accord, *Washington v. Seattle School District No. 1*, 458 U.S. 457, 485 (1982). Express racial classifications are immediately suspect because, "[a]bsent searching judicial inquiry . . . there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

Shaw v. Reno, 509 U.S. at 642-43.

The definitions restricting the OHA franchise are clearly racial. The definition of "native Hawaiian" in Hawaii Revised Statute § 10-2 expressly uses the term "race," and "native

Hawaiians" are defined as those descending from the "races" inhabiting the Hawaiian Islands previous to 1778. Although the definition of "Hawaiian" uses the term "descendant of the aboriginal peoples" which inhabited the Hawaiian Islands and exercised sovereignty and subsisted in 1778, the legislative history of the statute reveals that this term was also intended to be racially based. As the Hawaii Legislature stated with regard to the use of the word "peoples":

> The definitions of "native Hawaiian" and "Hawaiian" are changed to substitute "peoples" for "races." Your Committee wishes to stress that this change is non-substantive, and that "peoples" does mean "races."

Conference Committee Report No. 77, 1979 Haw. Sen. J. at 998.

In *Adarand Constructors v. Pena*, 505 U.S. 200 (1995), this Court reaffirmed that "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Id.* at 214 (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)). "[A]ny person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial treatment under the strictest judicial scrutiny." 505 U.S. at 224. Without a showing that the racial classification is "narrowly tailored" to further a compelling governmental interest, the racial restriction is invalid:

> [A]ll racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.

Id. at 227.

The State of Hawaii made no such showing below, instead relying solely on its argument that Hawaiians and native Hawaiians are the constitutional equivalent of an "Indian Tribe," and that its discrimination in favor of Hawaiians and native Hawaiians in the OHA franchise was a "political," rather than racial classification. Such an attempt, as demonstrated below, is a transparent attempt to get around the strict requirements of equal treatment demanded by the Fourteenth Amendment.

B. Hawaiians and Native Hawaiians Are Not an Indian Tribe

The Ninth Circuit concluded that the OHA voter qualification was "clearly racial on its face." *Rice v. Cayetano*, 146 F.3d at 1081. Notwithstanding this, Respondent argued and the court agreed that the racial restriction was exempted from strict scrutiny review because the actions of the State of Hawaii in establishing OHA are "similar to the special treatment of Indians that the Supreme Court approved in *Morton v. Mancari*." *Id.*

In so doing, the Ninth Circuit took *Mancari* and stood it on its head. Amicus submits that *Mancari* provides a narrow exception to the general rule of strict scrutiny, one applicable only to federally recognized Indian Tribes.

In *Mancari*, non-Indian employees of the Bureau of Indian Affairs (BIA) challenged a BIA regulation prescribing employment preference for Indians, on the grounds that it violated the equal protection component of the Due Process Clause of the Fifth Amendment. In upholding the preference, the Court emphasized the "plenary power of Congress . . . to legislate on behalf of federally recognized Indian tribes." *Mancari*, 417 U.S. at 551. As stated by the Court, this plenary power derives from the Indian Commerce and Indian Treaty Clauses of the United States Constitution:

> The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself. Article I, § 8, cl. 3, provides Congress with the power to "regulate Commerce . . . with the Indian Tribes," and thus, to this extent, singles Indians out as a proper subject for separate legislation. Article II, § 2, cl. 2, gives the President the power, by and with the advice and consent of the Senate, to make treaties.

Id. at 551-52.

Of fundamental importance to the present case, the Court concluded that the hiring preference was not "racial," but "political," because it did not apply to all Indians but only to those who were members of federally recognized Indian Tribes:

> The preference is not directed towards a "racial" group consisting of "Indians"; instead, it applies only to members of "federally recognized" tribes. This operates to exclude many individuals who are racially to be classified as "Indians." In this sense, the preference is political rather than racial in nature.

Id. at 553 n.24. The Court emphasized that it was membership in a federally recognized tribal group that was the critical distinction:

> The preference . . . is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entitles whose lives and activities are governed by the BIA in a unique fashion . . . . In the sense that there is no other group of people favored in this manner, the legal status of the BIA is truly *suigeneris*.

Id. at 554. Because of this distinction, the hiring preference for tribal members was not suspect, and instead was subject to review under a rational basis analysis. *Id.* at 555.

The Court's subsequent decisions have continued to emphasize that legislation singling out either Tribes, or Indians

as enrolled tribal members, does not offend equal protection because it is rationally related to Congress' plenary relationship with the "Indian Tribes." Thus, in *Duro v. Reina*, 495 U.S. 676 (1990), the Court made reference to "the Federal Government's broad authority to legislate with respect to enrolled Indians as a class, whether to impose burdens or benefits." *Id.* at 692. In *United States v. Antelope*, 430 U.S. 641 (1977), the Court stated that "federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications." *Id.* at 645. *Also see, e.g., Fisher v. District Court*, 424 U.S. 382, 390-91 (1976); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 480 (1976); *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 500-01 (1979).

It is undisputed that there is no Hawaiian or native Hawaiian "tribe."[3] Respondent can point to no treaty between a Hawaiian or native Hawaiian entity and the United States recognizing Hawaiians or native Hawaiians as a tribe.

Nor do Hawaiians and native Hawaiians meet the statutory or regulatory definition of those groups which would qualify to be recognized as a tribe. The federal statutes governing the formal organization and incorporation of an Indian Tribe, *see* 25 U.S.C. §§ 476-77, exclude groups in "any of the Territories, colonies, or insular possessions of the United States [except for] the Territory of Alaska." 25 U.S.C. § 473. Since Hawaii was a territory at the time of enactment of the statute in 1934, as stated by the Ninth Circuit in an opinion considering whether a native Hawaiian group could constitute a tribe, "Congress did

[3] The term "tribe" has been defined by the Court as "a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular although sometimes ill-defined territory." *United States v. Montoya*, 180 U.S. 261, 266 (1901), *also see United States v. Candelaria*, 271 U.S. 432, 442 (1926) (utilizing *Montoya* definition), and *United States v. Chavez*, 290 U.S. 357, 364 (1933) (same).

not originally intend the statutes governing the organization of new Indian tribes to apply to aboriginal groups in Hawaii." *Price v. State of Hawaii*, 764 F.2d 623, 626 (9th Cir. 1985). Hawaiians and native Hawaiians also do not meet the requirements for recognition as a tribe under the regulations by which the BIA acknowledges tribal existence. *See* 25 C.F.R. Part 83 (1984). These regulations establish tribal existence as

> a prerequisite to the protection, services, and benefits of the Federal Government available to Indian tribes by virtue of their status as tribes. Such acknowledgment shall also mean that the tribe is entitled to the immunities and privileges available to other federally acknowledged Indian tribes . . . ."

25 C.F.R. § 83.2. The regulations, however, are explicitly limited to "only those American Indian groups indigenous to the continental United States." 25 C.F.R. § 83.3(a).

That in itself should end the inquiry. Nevertheless, Respondent has taken the position below that Hawaiians and native Hawaiians are entitled to an equivalent treatment because of a "special trust relationship" among the United States, the State of Hawaii, and native Hawaiians, evidenced by Section 5(f) of the Hawaii Admission Act., Pub. L. No. 86-3, 73 Stat. 4, and the Hawaiian Homes Commission Act, Pub. L. No. 67-34, 42 Stat. 108.[4] Neither statute, however, provides any support for the assertion that the federal government considers Hawaiians and native Hawaiians to be a tribe within the meaning of *Morton v. Mancari*.

First, the HHCA only established a housing program for native Hawaiians on a certain portion of the ceded lands. It

[4] Respondent below also pointed to a number of federal statutes which include Hawaiians or native Hawaiians as racial groups entitled to special benefits or treatment by the federal government. Neither these statutes, nor the HHCA or the Hawaii Admission Act, have been tested judicially in light of *Adarand*.

granted no self-governing, independent, or "quasi-sovereign" status to the Department of Hawaiian Home Lands. Similarly, Section 5(f) of the Hawaii Admission Act simply provides that a permissible use for the ceded lands conveyed to the State of Hawaii was "for the betterment of conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended."[5] However, other than the lands devoted to the Hawaiian home lands program under Section 4 of the Hawaii Admission Act, the State of Hawaii was not required to devote any of its ceded lands for native Hawaiians:

> Such [ceded] lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide . . . .

Indeed, until the creation of OHA, the State of Hawaii devoted most of the ceded land income and proceeds to funding the programs of the Hawaii State Department of Education. *See* 80-8 Haw. Att'y Gen. Op., 1980 WL 26216.

Thus, the creation of OHA cannot be viewed as required by any provision of federal law, and certainly is not the result of the State of Hawaii carrying out a mandated federal "trust" relationship. Instead, it is an attempt by the State of Hawaii to create its own version of a "tribe." This Court has made clear, however, that states have no power to create "tribes." That authority rests solely with the federal government. *See Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. at 501.

That OHA is a pure state creation is confirmed by the legislative history of Hawaii Revised Statute Chapter 10. Directly relevant is the following statement by the 1979 Hawaii Senate Standing Committee:

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[5] The lands governed by the HHCA are a portion of the ceded lands. *See* Hawaii Admission Act, 73 Stat. 4, § 5(b).

> *The State's Plenary Power Over the Office of Hawaiian Affairs.* To give specific definition to the language "provided by law" as found in Article XII, section 6 [of the Hawaii Constitution], we turn to the case of *Santa Clara Pueblo v. Martinez*, 98 Sup. Ct. 1670 (1978), cited in Committee of the Whole Report No. 13, where on Page 1676 of the decision it is noted that despite the recognition given Indian tribes as distinct and independent communities, Congress retains "plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess." *This is not to intimate that the Office of Hawaiian Affairs is equated with Indian tribes. Rather, it is merely to state that even if that was the case, the State would maintain plenary powers over it.*

Senate Standing Report No. 773, 1979 Haw. Sen. J. at 1352 (emphasis added).

The illegitimacy of OHA is further confirmed by the fact that its beneficiaries (as well as the limited electorate which may vote for its trustees) are not restricted to native Hawaiians, but also includes "Hawaiians" with less than a 50% blood quantum. As noted by the Ninth Circuit, the State of Hawaii justifies its creation of OHA on the ground that

> the genesis of the whole structure was Congress's requirement that the new state of Hawaii accept the definition of native Hawaiian in the HHCA and accede to the purposes of the 5(f) trust which include, in part, the betterment of the conditions of native Hawaiians . . . [and that therefore] under *Morton v. Mancari* . . . the federal government and the state of Hawaii have the same special relationship with and owe the same

unique obligation to native Hawaiians as the federal government does to Indian tribes.

Rice v. Cayetano, 146 F.3d at 1078-79.

As demonstrated above, neither the HHCA nor the Admission Act created any special relationship. But even if it were conceded for the sake of argument that they did create some sort of "trust" relationship equivalent to a "tribe," that relationship would exist only with native Hawaiians with at least 50% Hawaiian blood, not the much broader racial class of those with any Hawaiian blood whatsoever, no matter how minuscule that quantum may be. Amicus contends that inclusion of those persons demonstrate that the OHA scheme does not meet even the rational basis test of *Mancari*.

In summary, the State's creation of OHA cannot be viewed as anything other than the creation of a racial class structure under which Hawaiians and native Hawaiians, and Hawaiians and native Hawaiians alone, receive benefits not available to other citizens of the State of Hawaii. While Petitioner did not directly contest the underlying constitutionality of OHA, such a state-created, race-based organization cannot be advanced by Petitioner as a legitimate basis for limiting the franchise on the basis of race.[6]

Once Respondent had asserted a race-based legislative scheme as the justification for the State's discriminatory voting practices, the court below was obligated to subject it to strict scrutiny: "[A]ll racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by the reviewing court under strict scrutiny." *Adarand*, 515 U.S. at 227. Not only did Respondent not put forward any evidence

[6] For an extensive analysis whether Hawaiians and native Hawaiians can claim a legal status similar to members of Indian Tribes, see Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 Yale L. J. 537 (1996).

which would justify the State's actions under *Adarand*, it is clear that the OHA scheme does not meet strict scrutiny review.

Respondent can put forth no competent evidence that OHA is necessary to remedy any past or present discriminatory government treatment of Hawaiians or native Hawaiians. *Wygant v. Jackson Board of Education*, 476 U.S. 267, 274 (1986). Indeed, what evidence exists shows that Hawaiians and native Hawaiians held a preferential position in society during most of the period of the Territory, and received benefits not available to other racial groups, the HHCA being the most obvious example. Hawaiians constituted an absolute majority of the registered voters in Hawaii for the first quarter of the twentieth century and the largest single voting group until 1940. Lawrence H. Fuchs, Hawaii Pono, at 80 (1961). During that period, Hawaiians comprised more than half the candidates for elected office. *Id.* at 161.

This was reflected in Hawaiians' heavy dominance of government. For example, in 1927 Hawaiians held 46% of the appointive executive positions, 55% of the clerical and other government jobs in the Territory, and more than half of the judgeships and elective offices. *Id.* at 162. A study conducted in 1935 showed that Hawaiians, although less than 15% of the total population, held almost a third of the public service jobs in the Islands. *Id.*

Those facing discrimination were in fact primarily immigrant plantation workers, especially the Japanese. *Id.*, at 82-83. This was reflected in plantation wage scales, where occupational status was based on ethnic identity. For example, on the plantations in the early 1900s the daily wage for Hawaiians was $2.94, but the wage for Japanese was only $1.50. *Id.* at 55.

Since a history of discrimination cannot be demonstrated, the OHA scheme cannot be described as a "narrowly tailored" means of correcting such discrimination, let alone being a

program that "will not last longer than the discriminatory effects it is designed to eliminate." *Adarand*, 515 U.S. at 237. Further, even if discrimination were simply presumed (which it cannot be), there is nothing in the record that shows any consideration of the use of race-neutral alternatives. *Id.*

III

ACCEPTANCE OF THE NINTH CIRCUIT'S REASONING LEGITIMIZING RACIAL RESTRICTIONS IN VOTING WOULD NOT ONLY EVISCERATE THE FIFTEENTH AMENDMENT BUT WOULD OVERTURN THIS COURT'S EQUAL PROTECTION JURISPRUDENCE

As demonstrated above, there is no reason justifying the racially limited franchise for OHA elections. The Fifteenth Amendment is absolute and means what it says: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color or previous condition of servitude."

Nor can respondent point to any provision of federal law which would justify such treatment on the basis that Hawaiians and native Hawaiians are a "tribe" entitled to special treatment under *Morton v. Mancari*. Lacking a federal basis, the only "trust" provisions are those which the State of Hawaii itself created to benefit a specific race.

Notwithstanding this, the Ninth Circuit chose to blithely ignore this Court's long-held jurisprudence that government classifications which discriminate on the basis of race are inherently suspect and subject to the most searching examination, and are presumptively invalid absent a showing both of a compelling interest for the classification and that the classification is narrowly tailored. *Adarand*, 515 U.S. at 235. Instead, the Court simply "accept[ed] the trusts and their administrative structure as we find them, and assume[d] that both are lawful." *Rice v. Cayetano*, 146 F.3d at 1079. Even

more breathtaking, the court indicated that the State of Hawaii's actions not only had a rational basis but would pass strict scrutiny review as well:

> [E]ven if the voting restriction must be subject to strict judicial scrutiny because the classification is based explicitly on race, it survives because the restriction is rooted in the special trust relationship between Hawaii and descendants of aboriginal peoples who subsisted in the Islands in 1778 and still live there . . . thus, the scheme for electing trustees ultimately responds to the state's compelling responsibility to honor the trust, and the restriction on voter eligibility is precisely tailored to the perceived value that a board "chosen from among those who are interested parties would be the best way to insure proper management and adherence to the needed fiduciary principles." 1 Proceedings of the Constitutional Convention of Hawaii of 1978, Standing Committee Rep. No. 59 at 644.

Id. at 1082.

Summarizing, the court's decision counsels that by the device of characterizing a scheme which creates a racially defined system of benefits and privileges as a "trust" between the State and the benefited class, not only can a State escape judicial review of such acts, but it may also, through racial restriction of the franchise, lawfully prohibit the rest of its citizenry from having any say in the matter. The conclusion that certain matters are of concern only to specific races comes dangerously close to resurrecting the "separate but equal" system of racial segregation once validated by *Plessy v. Ferguson*, 163 U.S. 537 (1896), and ignores the numerous decisions of this Court that a racial classification is presumptively invalid regardless of purported motivation. *See, e.g., Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (all classifications, including those asserted to be "benign," subject to searching judicial scrutiny).

If such can be done for Hawaiians and native Hawaiians, the potential exists for creation of similar vehicles for other racial groups as well. Although *Adarand* clearly indicates that race-based preferences are constitutional in certain circumstances, no case law indicates that decisions about how the preference should be administered will thereafter be made only by the benefited class to the exclusion of the rest of the society.

Limiting decision making to specific groups based "on the color of their skin . . . bears an uncomfortable resemblance to political apartheid." *Shaw v. Reno*, 509 U.S. at 647. The danger of apportioning assets, and the exclusive right to make determinations about those assets, to specific races as was done by the State of Hawaii in this case, is that it eventually will lead to a system of racial balkanization destructive of the democratic ideal embodied in our Constitution. As eloquently put by Justice Douglas:

> When racial or religious lines are drawn by the State, the multiracial, multireligious communities that our Constitution seeks to weld together as one become separatist; antagonisms that relate to race or to religion rather than to political issues are generated; communities seek not the best representative but the best racial or religious partisan. Since that system is at war with the democratic ideal, it should find no footing here.

Wright v. Rockefeller, 376 U.S. 52, 66-67 (1964) (dissenting opinion).

Further, the lower court's unwarranted reading of *Mancari* as validating racial classifications of persons so long as they possess any percentage of aboriginal blood is repugnant to the Court's entire equal protection jurisprudence.

As the Court has noted, the "rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the *individual*. The rights established are *personal rights*." *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948) (emphasis added). The broad reading of *Mancari* advocated by Respondent instead makes the extent of the right to equal treatment solely dependent upon one's membership in a group qualified by race. In other words, under the OHA scheme upheld by the court below, whether or not a person is entitled to certain treatment is determined by whether she is a member of the racial group which possesses Hawaiian blood, or of the racial group which does not possess Hawaiian blood.

The Court in *Mancari* was careful, however, to indicate that it was not upholding a preference based on "group" rights, but rather was acknowledging the "unique legal status of Indian Tribes" constitutionally mandated by the Indian Treaty and Commerce Clauses. *Mancari*, 417 U.S. at 551-52. Thus, the Court emphasized that the hiring preference upheld by the Court was "not directed towards a 'racial' group consisting of 'Indians,' [but] "instead . . . only applies to members of 'federally recognized' tribes." *Id.* at 553 n.24.

The bottom line is first, if Hawaiians were an Indian tribe, they would be subject to the plenary authority of Congress to the exclusion of Hawaii law and OHA would be invalid as an intrusion into a field fully occupied by the federal government. Second, while the Constitution grants Congress special powers as to Indian tribes which may override the Fourteenth and Fifteenth Amendments, those powers are exclusive to Congress. The Constitution nowhere grants statues any powers that override the Fourteenth and Fifteenth Amendments.

This distinction was ignored by the court below. As a result, the decision below throws open the door to creation of a society where equal treatment before the law is no longer the right of the individual, but rather is only derivative of group rights.

CONCLUSION

"The right to vote . . . is of the essence of democratic society." *Reynolds v. Sims*, 377 U.S. at 555. The Fifteenth Amendment prohibits all efforts to "segregat[e] . . . voters" on the basis of race. *Gomillion v. Lightfoot*, 364 U.S. at 341. The OHA franchise, limited by race, has the clear effect of permanently segregating the citizens of the State of Hawaii into two separate racial groups.

The decision of the court below also embraces a philosophy of group rights which is fundamentally at odds with the democratic ideals of the Constitution as well as the precept that it is individuals, not groups, who have rights to equal protection under the law.

The Court must take a firm stance and declare that any express racial limitation on the right to vote such as that contained in the OHA scheme offends the Fourteenth and Fifteenth Amendments and is invalid.

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Respectfully submitted,

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